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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 157

COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE.

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BRIEF OF THE STATE OF ILLINOIS, AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the United States:

This brief by the State of Illinois, as *amicus curiae*, is filed under the provisions of Rule 27 (9) of this Court. As will hereinafter more fully appear, the State of Illinois, by virtue of certain litigation in which it has already been and is now involved, is directly interested in having this Honorable Court reverse the judgment of the Circuit Court of Appeals in this case.

THE OPINIONS BELOW.

The opinion of the District Court of the United States for the District of Massachusetts, entered on May 1, A. D. 1946, is officially reported at 65 Fed. Supp. 763.

The opinion of the Circuit Court of Appeals for the First Circuit, entered on April 2, A. D. 1947, is officially reported at 160 Fed. (2d) 614.

JURISDICTION.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code (28 U. S. C. A. 347) as amended by the Act of February 13, 1925. The judgment of the Circuit Court of Appeals was entered on April 2, 1947, the petition for a writ of *certiorari* was filed in this Court on June 27, 1947 and was allowed on October 13, 1947.

CONCISE STATEMENT OF THE CASE.

The Federal question of substance, which is presented by the instant case, may be precisely stated as follows:

Where a taxpayer, owing Federal capital stock, Title VIII (Old Age Insurance) and Title IX (Federal Unemployment) taxes and State unemployment taxes, becomes insolvent and makes an assignment for the benefit of his creditors, and his assignee pays in full all capital stock and Title VIII taxes with interest—

> May the Federal government's right to priority of payment, insofar as Title IX taxes are concerned, be "satisfied" within the meaning of R. S. 3466, by the payment of only 10% of the face amount of said tax (or 10% of the funds available) directly to the Federal

government and the payment of the balance to an approved State unemployment fund (as the taxpayer could himself have done had he remained solvent), as the District Court, in effect held?

Or

Does R. S. 3466 require that the State's normal 90% share in the face amount of said Title IX taxes (which is used by the States only to pay actual benefits to unemployed workers) be forfeited in its entirety to the Federal government (which pays no unemployment benefits and, but for the taxpayer's intervening insolvency, would have been entitled only to 10% of the face amount of such taxes to defray its administrative costs), as the Circuit Court of Appeals, in effect held?

This question arises from **facts** which are **not** in dispute and may concisely be stated as follows:

The Somerville Sales & Service, Inc., being insolvent, in 1939 made a common law assignment for the benefit of its creditors. The Commissioner of Internal Revenue filed with the assignee a claim against the assignor for 1938 Federal unemployment taxes under Title IX of the Social Security Act in the sum of $963.08, for 1938 and 1939 Federal insurance contribution taxes under Title VIII of the said Act in the sum of $690.05 and for 1939 Federal capital stock taxes in the sum of $21.00. The Commonwealth of Massachusetts filed with the assignee its claim for State unemployment taxes under the Massachusetts Unemployment Compensation Act in the sum of $803.72, representing contributions due it for the years 1938 and 1939. On October 6, 1939, the assignee paid, out of the sum of $1,135.11 which he had realized from the sale of the debtor's assets, the sum of $803.72 in full payment of the claim of the Commonwealth of Massachusetts and the remainder of $331.39 he paid to the Collector of Internal Revenue. This latter sum was credited to Title VIII due for 1938 and there remained unpaid the sum of $1,-

342.74 with interest. Massachusetts has agreed to pay over the above-mentioned $803.72 to the United States if the payment to it was in disregard of the priority of the United States under R. S. 3466, and the United States has agreed that it prevails the judgment shall be limited to $803.72.

On these facts, the District Court, on May 1, 1946, held that the United States had priority for the full amount of its capital stock and Title VIII taxes and for 10% of the amount of its Title IX taxes, but that it could not recover the remaining 90% of said tax on the ground that the taxpayer or his assignee had the alternate right to pay 90% of his obligation under Title IX to an approved State unemployment fund (65 Fed. Supp. 763).

On appeal and cross-appeal, the Circuit Court of Appeals for the First Circuit, on April 2, 1947, affirmed the judgment of the District Court as to capital stock and Title VIII taxes but reversed as to Title IX taxes, holding, in substance, that the taxpayer's assignee had no alternative right to pay any part of the Title IX taxes to a State unemployment fund and that the United States had priority, under R. S. 3466, for the **full** amount of capital stock taxes, Title VIII taxes **and** Title IX taxes (160 Fed. (2d) 614).

The present action by the Commonwealth of Massachusetts seeks to reverse the decision last above described.

ARGUMENT.

I.

The Two Gordon Cases, Upon Which the Circuit Court of Appeals and the Federal Government Rely, Did Not Involve Title IX (Federal Unemployment) Taxes and Are Not Controlling Here.

On May 23, 1945, the Supreme Court of Illinois, in the consolidated cases of *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *Advertising Review Publishing Company, et al.—(United States of America, Appellant),* No. 28490, and *The People, for the use of Francis B. Murphy, Director of Labor, Appellee,* v. *The Chicago Waste & Textile Company, et al.—(Carter H. Harrison, Collector of Internal Revenue, Appellant),* No. 28474, reported at 391 Ill. 29, held, in substance, that under Section 3466 of the Revised Statutes, the United States was entitled to priority on that portion of its claim which was for Federal insurance contributions (under Title VIII of the Social Security Act) plus interest, and that any balance thereafter remaining should be paid to the Director of Labor of the State of Illinois and credited against the claim of the United States for Federal unemployment taxes (under Title IX).

In 1946, upon petitions by the State of Illinois, this Court granted writs of *certiorari* to review said decisions, the *Advertising Review* case (No. 28490) becoming, in this court, *People of the State of Illinois, ex rel. Robert L. Gordon, Director of Labor, Petitioner,* v. *United States of America, Respondent,* No. 749 of 1945; and the *Chicago Waste & Textile* case becoming *People of the State of Illi-*

nois, ex rel. Robert L. Gordon, Director of Labor, Petitioner, v. *Nigel D. Campbell, Collector of Internal Revenue, Respondent*, No. 750 of 1945 and later No. 35 of 1946.

In said No. 749 (*Gordon* v. *United States*), this State, in brief, contended:

1—That, because of the intent of Congress as manifested in the Social Security Act and related legislation, Section 3466 of the Revised Statutes did not apply to give the United States priority for Social Security and capital stock taxes over the claims of a State for unemployment compensation contributions.

2—That the claim of the State for unemployment compensation contributions was a secured claim and was therefore entitled to priority over the unsecured claims of the United States for Social Security and capital stock taxes.

On April 22, 1946, this Court, in said No. 749 (*Gordon* v. *United States*, 328 U. S. 8), *held* that the provisions of the Social Security Act and related Federal legislation did *not* evince an intent on the part of congress to amend R. S. 3466 by making its provisions inapplicable as against state unemployment compensation contributions, and *affirmed* the ruling of the Illinois Supreme Court. *Actually* no issue as to Federal unemployment (Title IX) taxes was involved.

In said No. 750 (*Gordon* v. *Campbell*) (later No. 35 of 1946), this State, in brief, contended:

1—Same at No. 1 in No. 749 (above).

2—That the debtor was not insolvent within the meaning of Section 3466 of the Revised Statutes.

3—That the State's lien for unemployment compensation contributions was so specific and so far perfected as effectually to exclude the funds in question from the estate of the debtor and thereby to defeat the Federal government's access to such funds.

4—Same as No. 2 in No. 749 (above).

On December 23, 1946, this Court in said No. 750 (*Gordon v. Campbell*, 329 U. S. 362), which had by then become No. 35 of the October 1946 term, after pointing out that the earlier decision in No. 749 controlled the same issues in the latter case, *further held* that the debtor was insolvent within the meaning of Section 3466 and that the lien of the State of Illinois was not sufficiently specific or perfected to defeat the Federal government's priority under Section 3466, and *affirmed* the ruling of the Illinois Supreme Court. Again, the issue did *not* involve Federal unemployment (Title IX) taxes.

The decisions of this Court in these two *Gordon* cases are the decisions upon which the Circuit Court of Appeals for the First Circuit relies most heavily in the decision which the Commonwealth of Massachusetts here seeks to reverse.

Apparently because of the relatively small amounts involved, the Federal government failed to file its own cross-petitions for *certiorari* in these two *Gordon* cases, thereby *precluding* this Court from reaching or passing upon the *further* question whether the Supreme Court of Illinois had erred in holding that, after the Federal government had been paid its Federal insurance contributions (under Title VIII), the balance then remaining should be paid to the State Director of Labor and credited against the claim of the United States for Federal unemployment taxes (under Title IX), substantially as Massachusetts now contends in the case now at bar.

Thus, in these two *Gordon* cases, this Court did *not* pass upon or settle the question now presented by the instant case. So far as we are advised, this Court has not, until the filing of the instant case, had an opportunity to pass upon or settle the precise but nevertheless extremely important Federal question of substance here presented.

That the Federal question here presented to this Court for the first time is not purely academic or abstract is evidenced, at least in part, by the fact that the State of Illinois has, at the present time, pending and undetermined in the Federal District Court for the Northern District of Illinois, Eastern Division, at Chicago, two cases entitled *United States of America, plaintiff*, v. *P. C. Gartley Motors Company, et alia, defendants*, No. 44-C-671; and *Robert G. Mitchell, assignee, etc., plaintiff*, v. *Carter H. Harrison, Collector, et al., defendants*, No. 44-C-716, which involve this same precise issue and have been continued generally pending the ruling of this Court upon the petition for a writ of *certiorari* in this instant case.

In view of these considerations, we most respectfully submit that the two *Gordon* cases, upon which the Circuit Court of Appeals and the Federal government rely, did *not* involve Title IX (Federal Unemployment) taxes and are *not* controlling here.

II.

Insofar as Title IX (Federal Unemployment) Taxes Are Concerned, the Federal Government's Priority Extends Only to 10% of the Face Amount of Its Claim (or 10% of the Funds Available) Because 90% of Its Claim Has Already Been "Satisfied" Within the Meaning of R. S. 3466 by the Assignee's Payment to an Approved State Unemployment Fund.

Any discussion of this subject must take cognizance of the history and operation of this social legislation which clearly indicates the close integration and inter-relationships between the Federal and State measures to combat the evils of unemployment.

The critical conditions which give rise to a national program of unemployment insurance have been graphically described by this Court in *Steward Machine Company* v. *Davis*, 301 U. S. 548, which involved the constitutionality of Title IX, where this Court, at pages 586-588, declared:

> "* * * there is need to remind ourselves of facts as to the problem of unemployment * * *. During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than ten million; at times a peak was attained of sixteen million or more. Disaster to the breadwinner meant disaster to dependents. * * * The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare. Cf. *United States* v. *Butler*, 297 U. S. 1, 65, 66. *Helvering* v. *Davis*, decided herewith, *post*, p. 619. The nation responded to the call of the distressed. Between January 1, 1933 and July 1, 1936, the states * * * incurred obligations of $689,291,802 for emergency relief; local subdivisions an additional $775,675,366. In the same period the obligations for emergency relief incurred by the national government were $2,929,307,125, or twice the obligations of states and local agencies combined. According to the President's budget message for the fiscal year 1938, the national government expended for public works and unemployment relief for the three fiscal years 1934, 1935 and 1936, the stupendous total of $8,681,000,000. The parens patriae has many reasons—fiscal and economic as well as social and moral—for planning to mitigate disasters that bring these burdens in their train. * * * Insofar as there was failure by the states to contribute relief according to the measure of their capacity, a disproportionate burden, and a mountainous one, was laid upon the resources of the government of the nation."

In *Helvering* v. *Davis*, 301 U. S. 619, which involved an attack upon the constitutionality of Titles II and VIII of the Social Security Act (Old Age Benefits), this Court, at page 541, stated:

> "* * * The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided. Unemployment spreads from state to state, the hinterland now settled that in pioneer days gave an avenue of escape. * * * Spreading from state to state, unemployment is an ill not particular but general, which may be checked, if Congress so determines, by the resources of the nation. If this can have been doubtful until now, our ruling today in the case of the *Steward Machine Co., supra,* has set the doubt at rest. * * *"

The national scope of the problem of unemployment was stressed by the President of the United States in his message to Congress on June 8, 1934,[1] wherein he declared:

> "We are compelled to employ the active interests of the nation as a whole through government in order to encourage a greater security for each individual who composes it. * * * If, as our Constitution tells us, the Federal government was established, among other things, 'to promote the general welfare' it is our plain duty to provide for that security upon which welfare depends. * * *"

Both branches of Congress emphasized that unemployment relief posed the most serious question for the nation.[2]

It was a problem nation-wide in scope which could not be combatted by the States acting individually. Moreover, most States were reluctant to enact unemployment compensation legislation for fear of imposing the additional burden of taxation entailed upon their already depressed

[1] Cong. Rec., Vol. 78, Pt. 10, p. 10770.

[2] Senate Report No. 628, 74th Congress, 1st Session, p. 10; House Report No. 615, 74th Congress, 1st Session, p. 7.

industries, thus placing their industries at a disadvantage in competing with industries of States which had no such legislation.

To cope with the problem of unemployment, Congress enacted Title III, VII and IX of the Social Security Act.[3] Briefly, Title IX levied a uniform pay roll tax on employers of eight or more throughout the nation. **The Federal Statute**, however is not of itself a complete unemployment compensation law; it provides pay roll taxes but **makes no provision for the payment of unemployment compensation to unemployed workers, leaving that function to the States.**

It is obvious that a mere plan for taxation would not solve the problem which faced Congress and the nation. The heart of any plan to remedy the evil of unemployment is the stabilization of employment and **the payments of benefits to unemployed workers to cushion and thereby prevent the cumulative effects of loss of income.** This vital function, under the Federal plan, was to be carried on **by the States** in the systems which the Federal Act sought to stimulate.

The Federal plan was simply this: As most States were hesitant to set up unemployment compensation systems because of the disadvantage it would impose upon their industries in interstate competition, the Federal plan levied a tax on employers of **all** States, and then proceeded to allow an offset credit up to 90 per cent of the Federal tax to those employers who contributed to State unemployment compensation funds. The combination of the nation-wide tax and the offset credit for amounts paid into State funds thereby equalized the burden on all industries. Since employers of all States were obliged to pay the Federal pay roll tax, and yet the Federal Government paid no benefits

[3] Chap. 531, 49 Stat. 620.

to workers, the plan of the Federal legislation both removed the fear of disadvantage in interstate competition and offered an inducement to the States to set up approved unemployment compensation systems whereby the State employers could obtain the offset credit and the State workers could obtain benefits in the event of unemployment.

Further to encourage the States to establish unemployment compensation systems, Congress, in Title III of the Social Security Act, provided for grants to cover the administrative costs of such systems. The funds for such grants are appropriated by Congress from the 10 per cent of the Federal tax which the government retains for the purpose of meeting the costs of administering the State unemployment compensation systems. However, as in Title IX, the State unemployment compensation laws are required to meet certain minimum criteria.

As stated by the President in his message to Congress on January 17, 1935,[4] sponsoring the Federal law:

> "With respect to Unemployment Compensation, I have concluded that the most practical proposal is the levying of a uniform Federal pay roll tax, 90 per cent of which should be allowed as an offset to employers contributing under a State Unemployment Compensation Act. The purpose of this is to afford a requirement of a reasonable uniform character for all states cooperating with the Federal Government, and *to promote and encourage the passage of unemployment compensation laws in the states.* The ten per cent offset should be used to cover the cost of Federal and State administration of this broad system." (Emphasis added.)

The 90 per cent credit provision in the Federal law was designed to encourage the passage of State unemployment

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[4] Cong. Rec., Vol. 79, Pt. 1, p. 546.

compensation laws which would provide the actual protection against unemployment by the payment of benefits. It provides that each employer may reduce his Federal tax up to 90 per cent by the amount he has contributed to a State unemployment compensation fund.

The Federal tax being 3 per cent of the pay roll, practically all States enacted legislation calling for a standard tax of 2.7 per cent of the pay roll of employers subject to the scope of their legislation, the 2.7 per cent rate being equivalent of 90 per cent of the Federal tax. Thus an employer paying the full State tax and offsetting this amount against his Federal tax paid no more than if he had paid the full Federal tax to the Federal government, yet the amount he paid to the State went into the funds which actually operated as the protective device against the menace of unemployment.

Under normal conditions where the employer is solvent, the credit provisions operate as follows:

If an Illinois employer had a taxable pay roll in the amount of $100,000 in the year 1938, it would have had a Federal tax (without deducting the offset credit) of $3,000. Contributions to the State of Illinois at the rate of 2.7 per cent would amount to $2,700. If the employer paid the State, he would be able to credit the State payments against the Federal tax to the extent of 90 per cent of the latter. Since the amount of $2,700 is exactly 90 per cent of $3,000, the amount of the Federal tax, the employer would be entitled to offset the full amount of the payment to the State against the Federal tax and the amount actually due the Federal government would have been $300, rather than $3,000.

The plain purpose of the credit is to build up an adequate fund through the payment of contributions into the

State unemployment compensation systems through which the fundamental purpose of the entire legislation would be effected. Clearly, Congress was not concerned with Federal revenue in this measure, for the credit provision clearly indicates that 90 per cent of the tax was never intended to flow into the Federal revenue. That 90 per cent was a lever to pressure the States into enacting unemployment compensation systems necessary to fulfill the end sought by the Social Security Legislation. It must be borne in mind that the Federal government paid no benefits and the success of the plan to combat unemployment depended on the State systems which insured the worker against loss of income in the event of unemployment.

That these principles were uppermost in the mind of Congress in extending the credit is apparent from an examination of the reports of both the Senate Finance Committee and the House Committee on Ways and Means.[5] Moreover, Congress believed that the general welfare of the country would be better served by the payment of contributions into State unemployment compensation funds than by the payment of the tax to the Federal government. *Steward Machine Company* v. *Davis, supra,* p. 589.

Under Title IX, the 90 per cent credit may be taken when the State has been paid on or before the last day on which the employer is required to file its yearly Federal return, i.e., February 1 of the following year. However, if the payment was made to the State after February 1, but on or before the following June 30, a credit of 81 per cent was permitted against the Federal tax. This reduction in the amount of credit allowed after February 1 provided an inducement to employers to make prompt payment to the States.

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[5] Senate Report No. 628, 74th Congress, 1st Session, p. 15; House Report No. 615, 74th Congress, 1st Session, p. 16.

Further evidence in Title IX that Congress was primarily interested in building up the State funds lies in the removal of the time linfitation for the obtaining of the full 90 per cent credit in those cases where the assets of the employer are in the hands of a court of competent jurisdiction at any time between the due date and the following June 30.

Nor is it only in Title IX that Congress has evidenced its intent to build up State funds, for time and time again Congress has demonstrated that it is the payment of contributions to the States which advances the purposes of the Federal government. Although the credit against the Federal tax was originally allowed only if contributions to State funds were paid within a specified period of time, Congress has repeatedly amended Title IX so as to extend the credit to taxpayers who are delinquent in the payment of contributions, in order to induce them to pay their contributions to the States.[6]

In the second Revenue Act of 1940, Congress waived the time for obtaining credit against the Federal tax in the case of any taxpayer who was delinquent in his 1936, 1937, 1938, or 1939 contributions to a State fund. Such taxpayers were allowed the full 90 per cent credit if they paid their 1936, 1937, or 1938 contributions to their own State before December 6, 1940. As to the 1939 contributions, the credit was limited to 81 per cent of the Federal tax, except that the full 90 per cent credit could be taken regardless of the date when paid to a State fund, in those cases where the assets of the taxpayer were in the control of a receiver appointed by or under the control of a court in the period subsequent to the passage of the Act and December 6, 1940.

[6] Section 1601, Internal Revenue Act of 1939; Section 701, Second Revenue Act of 1940; Section 701, Revenue Act of 1941; Section 602, Revenue Act of 1943.

In the same Act, another special exception is made where contributions have been paid by mistake to the wrong State. In such case, payment under the proper State law is considered to have been made on the date of the erroneous payment, for the purposes of credit against the Federal tax.

The Revenue Act of 1941 continued the policy of encouraging the payment of delinquent contributions to the State by allowing full credit against the Federal tax for the payment of State taxes for 1936, 1937, and 1938, and by allowing a credit of 81 per cent for the payment of 1939 and 1940 State unemployment compensation contributions.

Finally, in the Revenue Act of 1943 (Section 602, Public Law 235, enacted February 25, 1944) Congress extended the 81 per cent credit offset for the payment of delinquent taxes for any year, **regardless of the date of payment of State contributions.**

It is to be stressed that in the absence of these foregoing enactments waiving the time limitations, the Federal government would have been entitled to the full three per cent, **regardless of whether or not the State was paid**. Yet the Federal government has repeatedly foregone the collection of taxes **technically due to it** in order to induce payment of contributions into State funds. It is apparent that Congress intended the Federal government should receive only 3/10 of one per cent and that the additional amount which it continually waived in favor of the payment into State funds was the device whereby taxpayers would be induced to pay their State contributions.

Thus by the numerous exceptions extending the time for credit, Congress has clearly indicated that its prime concern is in the building up of State funds for the payment

of unemployment benefits. **Any doubt that Congress did not consider this as a source of revenue for the Federal government is resolved by the 1937 Act of Congress[7] wherein Congress authorized an appropriation in excess of $20,000,000.00 to this State's unemployment compensation fund. This represented 90 per cent of the taxes which the Federal government had collected from Illinois employers prior to the enactment of the Illinois Unemployment Compensation Act.**

The intention of Congress to achieve the purposes for which Title IX was enacted, through the payment of contributions into State unemployment compensation systems, is strikingly revealed in this action, which was part of legislation which turned back 90 per cent of the taxes collected from employers prior to the enactment of State systems into the State unemployment compensation systems which had been established subsequent to the initial payments of taxes under Title IX. Nothing could demonstrate more clearly the Congressional intent that the State should receive 90 per cent of the amount due the Federal government under Title IX.

Further illustration of the interest of Congress in this measure as part of a plan to stabilize employment and not as a revenue source is disclosed in its willingness to allow the taxpayer to offset against the Federal tax the credit which he has received against State contributions under a State plan of experience rating. Ordinarily, where the Federal tax is 3 per cent of the pay roll and the State tax is 2.7 per cent, contributions paid into the State fund equal 90 per cent of the Federal tax and the entire credit is obtained.

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[7] Public Act 353, Ch. 755, 50 Stat. 754; Second Deficiency Appropriation Act of 1938, Ch. 681, 52 Stat. 1148.

However, under the "experience rating" provisions of the Illinois Unemployment Compensation Act and of the Acts of other States, employers may pay contributions at a lower rate; in Illinois as low as 5/10 of one per cent. Thus, employers who have a stable employment record are required to pay contributions which amount to considerably less than 90 per cent of the Federal tax. This experience rating plan by the reward of a lower rate is intended to induce employers to stabilize their employment, and so, if the employer were allowed to credit against the Federal tax only what he **actually** paid into the State fund, his total tax would remain the same and the inducement would fail of its purpose. Consequently, to avoid disappointing this incentive, the Federal law[8] permits the taxpayer, in addition to the credit for the amount actually paid to the State funds, to take a further credit equal to the difference between the amount of State contributions which he would have had to pay, had he not secured the reduced rate, and the amount that he actually paid to the State. In other words; the additional credit equals the amount of the reduction in the State tax.

This provision illustrates quite clearly the obvious intention of Congress that the United States was to receive only .3 of one per cent and that Congress was willing to offset against the Federal tax not only the actual amounts paid into State funds but also the credits allowed by the States under approved experience rating plans.

There is still further proof, if need be, of the deep concern which Congress has manifested in the maintenance and growth of State unemployment compensation funds. Congress has fully recognized that such funds would play a major role during the period of post-war readjustment

[8] Title IX, Social Security Act, 1937; Section 1602, Internal Revenue Code, 1939.

and would serve as the first line of defense for the millions of workers employed in war industries who would be laid off and unemployed during industry's reconversion and readjustment to peace-time production. The Senate and the House appointed Special Committees on Post-War Economic Policy and Planning, which held extensive hearings on the problem of unemployment compensation in the post-war period.[9] Interviews with representatives of important government and private agencies on post-war problems and plans disclosed that "The fear of unemployment after the war colors the thinking of all the agencies interviewed. Those concerned with the labor problems give it first rank in their planning."[10] As a result of the recommendations of the said Special Committees on Post-War Economic Policy and Planning,[11] Congress enacted legislation guaranteeing the solvency of State unemployment compensation funds. The War Mobilization and Reconversion Act (Title XII)[12] authorizes loans to the several States for the purpose of bolstering State unemployment funds.

From the foregoing it is evident that Congress never contemplated that the full three per cent would be paid to the Federal government, as the United States will perhaps contend. The primary concern of the Federal legislation was not in revenue to build up the Federal treasury, but on the contrary to force the accumulation of State funds for the payment of benefits. It is apparent that Title IX

[9] Hearings before the Special Committee on Post-War Economic Policy and Planning, United States Senate, 78th Congress, Second Session, Pt. 3, Unemployment Compensation; Hearings before the Special Committee on Post-War Economic Policy and Planning, House of Representatives, 78th Congress, 2nd Session, Pts. 2 and 3, Economic Problems of the Transition Period.

[10] Senate Document No. 106, 78th Congress, 1st Session, p. 79.

[11] Senate Report No. 539, Pt. 5, 78th Congress, 2nd Session, p. 6; House Report No. 1855, 78th Congress, 2nd Session, pp. 27-28.

[12] 50 U. S. C. A. App. 1667; Senate Report No. 565, 79th Congress, 1st Session, p. 2.

was intended to collect a Federal tax sufficient only to enable the United States, through the Social Security Board, to provide for the administration of State unemployment compensation systems. Any accrual to the general revenue has been incidental and was not contemplated. The tax collected has been more than ample to meet the need.[13]

To refuse to recognize that payment to the State would be applicable against the Federal tax under the offset provisions of the Federal legislation would deprive the State of funds needed to pay benefits, thereby defeating the patent intent of Congress. **It must be emphasized that the employees of a delinquent insolvent employer must be paid benefits under Illinois law if they are otherwise eligible, regardless of whether or not the State collects the corresponding contributions from the employer.** Congress, by the numerous exceptions and extensions, has evidenced that it considers payment into the State funds as more important to the fundamental purpose of social security than payment into the Federal treasury.

Section 3466 of the Revenue Code does not enter into this consideration for there is no question of priorities in the State's contention. It is simply a question of the intention of Congress—whether Congress intended that the Federal tax could be satisfied by payment into a State fund. The question must be answered in the affirmative.

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[13] On June 7, 1944, in hearings before the subcommittee of the Committee on Appropriations, United States Senate, 78th Congress, second session on H. R. 4899, Chairman of the Social Security Board Altmeyer, at Page 39 of the hearings report, stated:

> "That is another phase, I think that should be borne in mind. The Federal Government gets three-tenths of one per cent of the three per cent unemployment compensation tax which is levied by the Federal Government. That three-tenths of one per cent has been $450,000,000 in excess of the annual appropriations that Congress has made to the various States for the administration of The Unemployment Compensation Act. So at the present time the Federal Government is $450,000,000 ahead."

The same conclusion was reached by the United States District Court in the case here at bar, where the Court stated (65 F. Supp. 763):

"The question, nicely analyzed, seemed to me to be one not of priority but of alternative obligation.

"The force of that analysis seemed to me to be more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548 was stressed. *As to 90 per cent of the taxes under that Title the objective of Congress was not to collect Federal revenues but to stimulate the creation of and payment to State unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under State unemployment compensation plans.*

"The correctness of the foregoing reasoning seemed to me to be proved by a supposititious case. Suppose A, an insolvent, with $200 in assets, owed $100 to the United States for 1938 Title IX taxes, 90 to Massachusetts for 1938 unemployment compensation contributions and $200 to general creditors. Can it be supposed that a court that was sensitive to the principle of marshalling assets would distribute the assets so that the United States received the first $100, Massachusetts the second $90, and the general creditors $10? To do that would give the two governments more than Congress contemplated and restrict the general creditors to 5 cents on the dollar. Would not a court that was mindful of the strict legal rights of the two governments, of the policies declared in their legislation and of the rights of the general creditors to be subject to no greater priorities than those governmental rights and policies require, distribute $10 to the United States, $90 to Massachusetts, and $100 or 50 cents on the dollar to the general creditors? *This would allow the two governments to receive all that they claimed from the insolvent before his insolvency and would follow the rules of priority established by R.S. § 3466.*" (Emphasis added.)

Even if one does consider Section 3466 in connection with the matter, the State's contention is not inconsistent with the priorities established by that provision. Section 3466 requires that debts due the United States "be first satisfied." The statute does not say and does not mean that a debt in all cases must be fully paid in cash. For example, the debt may be compromised,[14] and property may be received in payment.[15] The word "satisfied" clearly expresses this thought. An accord and "satisfaction" has long been a recognized means of discharging a debt.

Any construction that the Federal government must be paid the full three per cent in cash first, would lead to absurd situations. Assume for the purpose of illustration that the debtor owed the sum of $10,000.00 to the United States for Federal Unemployment Tax, and that he owed the State $9,000.00 for unemployment contributions. Assume further that there is available for distribution the amount of $10,500.00. Yet, if as may be argued by the government, the full amount must first be paid to the Federal government in cash, with no allowance for the offset credit, an absurd situation results. In such case the Federal government would receive the full $10,000.00 and $500.00 would remain for the State. However, the debtor could then obtain a refund from the Federal government because of the $500.00 payment to the State on the basis of the offset credit. The $500.00 refunded by the Federal government then would be applied to the balance owing to the State and thus in turn qualify the debtor's estate for a refund from the Federal government for this second $500.00 paid to the State. This process could be repeated until the State had been paid the full amount of $9,000.00 and the Federal

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14 Revised Statutes, Section 3469, 31 U. S. C. A. 194; Internal Revenue Code Section 3761.

15 Op. Atty. Gen. 236.

government retained the amount of $1,000.00, **which was all that Congress intended the Federal government should get where a State system had been set up.** And certainly Congress never intended that such circuitous process would have to be resorted to in order for the State to obtain the contributions Congress intended it to have.

Thus, in the foregoing case, if the debtor had remained solvent, the State would have received $9,000.00 and the United States $1,000. The same result would follow even though the debtor became insolvent, but the assets were $10,001 or more. This ultimate result would certainly be in accord with the expressed intention of Congress. But if the assets amounted to $10,000 exactly or less, the interpretation that the Federal government must be paid its three per cent in cash without allowance for the offset credit would give the Federal government a windfall of $9,000, at the expense of the State unemployment compensation funds. Such a result would certainly distort the end sought to be accomplished by this legislation. The additional 90 per cent, never contemplated by Congress as revenue but intended more or less as a penalty to prod the States to create unemployment compensation systems, would be converted into a penalty on the State which had so created a system at the prompting of Congress. For, as pointed out, the State has assumed the obligation of paying benefits to the former employees of the employer regardless of whether or not it has collected the corresponding contributions from the employer.

The United States government, in support of its contention that it should receive the full 3 per cent Federal Unemployment Tax, will no doubt rely upon this Court's decisions in *People ex rel Gordon* v. *Campbell*, 329 U. S. 362, and *People ex rel Gordon* v. *United States*, 328 U. S. 8.

Those cases are not controlling on this issue, for, as we have already pointed out (ante, pp. 5-8), the statements concerning priorities with regard to Title IX taxes are *dicta*. The facts and issues in these two *Gordon* cases were such that it was merely a question as to the relative status of State contributions and taxes under Title VIII.

But it will no doubt be asserted that the legislation under Title VIII and Title IX are so closely related that the reasoning of the Supreme Court is decisive on issues arising under Title IX as well as Title VIII.

It is true that both Titles are designed to promote the economic security of the worker. Title VIII is directed against insecurity caused by loss of income resulting from the incapacities of old age. Loss of income due to the recurrent periods of individual unemployment and to mass cyclical unemployment is sought to be corrected in Title IX.

But however related the purposes for which Titles VIII and IX were enacted, the means used to achieve that result are different. **Under Title VIII, the Federal government has undertaken the payment of old age benefits. Under Title IX, the Federal government does not pay benefits to unemployed workers; that is undertaken by the States** and the offset credit of 90 per cent of the Federal tax is considered as the means of inducing the establishment of State systems. **There is no offset allowance against taxes for Federal Old Age and Survivors' Insurance under Title VIII**; for these funds are needed for the financing of the benefit payments under Title VIII. There is the allowance of the offset credit under Title IX because the Federal government pays no unemployment benefits and those funds paid into the State systems are accomplishing the Federal purpose. Thus, this Court could say, as it did in *Steward Machine Co.* v. *Davis*, 301 U. S. 548, that the needs

of the Federal treasury could be cared for as well by the payment of unemployment compensation contributions to the States as by payment of taxes to the United States.

Thus, although both Title VIII and Title IX have the same end in view, economic security for workers, **the means used to achieve that purpose are divergent.** In the one, the whole tax was intended to be collected as revenue for the financing of benefits to be paid by the Federal government. In the other, only 10 per cent was intended to come into the Federal treasury, and the rest was to be channelled into State unemployment compensation funds, there to be used in the payment of benefits.

Nor, as has been pointed out, is there a question of priorities. The question is solely whether Congress intended that the Federal claim for unemployment taxes could be "satisfied" by the offset credit for funds paid into State unemployment compensation funds. That such was the Congressional intent has been amply demonstrated.

The United States will probably also contend that **only** the **taxpayer** can pay the State and offset the credit against the Federal tax. That contention ignores the Federal legislation itself which provides that State contributions may be made and the offset credit allowed when the assets are in the possession of a receiver, trustee or a court of competent jurisdiction.

Section 902(a) of Title IX of the Social Security Amendments of 1939 provided that in cases where the assets of an employer came into the custody of a receiver any time after August 10, 1939 and until October 9, 1939, the receiver could obtain the Federal credit for the years 1936, 1937 and 1938 by paying the State.

Section 1601(a)(3) of the Federal Unemployment Tax Act permits the full 90 per cent credit for the preceding

year at any time if the assets of the employer come into the possession of a receiver, trustee, or a court of competent jurisdiction between the due date and the following June 30, and the State is paid.

Section 701(a) of the Revenue Act of 1940 provided that if the assets of the employer are in the control of a receiver appointed by or under the control of a court at any time between October 8, 1940 and December 6, 1940, 81 per cent of the credit for 1939 may be obtained by paying the State.

Section 701(b) of the Revenue Act of 1941 permitted a receiver appointed during the extension of time in which a solvent employer could pay the State and thereby obtain the Federal offset, to obtain an 81 per cent credit for the year 1940 by paying the State at any time.

A similar provision (Section 602(b), Revenue Code of 1943) permitted such credit for the years 1941 and 1942.

Thus, Congress has continuously indicated that it intended that the credit offset could be obtained by payment to the State, **even though insolvency had intervened and the payment is made under a receiver, trustee, or court of competent jurisdiction.** This is consistent with the Congressional concern with protection of the State funds from which benefits would be paid, even at the expense of the Federal tax.

As for the allowance of the offset frustrating the priority of the Federal government, it should be noted that Congress has specifically provided that such allowance be permitted in cases of insolvency and further, the Federal priority is *not* denied for the Federal claim is satisfied to the same extent by the payment and credit offset as it would be if the payment were made in cash.

In the instant case, the funds available for payment of unemployment taxes are insufficient to pay the Federal gov-

ernment its 10 per cent and the State its full 90 per cent of the Federal claim. **Accordingly, there are three possible ways of handling the offset allowance.**

In *People* v. *Chicago Waste & Textile Co.*, 391 Ill. 29, 62 N. E. (2d) 537, the Illinois Supreme Court ordered that the funds remaining after payment of Title VIII taxes be first applied to pay the State's claim for unemployment contributions, which would be allowed as an offset credit to satisfy an equivalent part of the Federal claim.

To illustrate with an example, we may assume that the full three per cent owed to the Federal government was $10,000, that the amount owed to the State for unemployment contributions was $9,000, and that the available funds of the debtor amounted to only $5,000. If the entire $5,000 is paid to the United States first, its claim will have been satisfied to the extent of $5,000 and will remain unsatisfied to the extent of $5,000.

If, however, the $5,000 is paid to the State, the payment to the State will have the effect of reducing the claim of the United States by the amount of $5,000, due to the offset credit, and the unsatisfied part of the claim of the United States remains $5,000. Thus, the Federal claim is reduced and **satisfied equally** by payment directly to the Federal funds or to the State.

Thus, under the **first** possibility, under the precedent set by the Illinois Supreme Court, all funds available, for the payment of unemployment taxes would first be applied to the payment of the State's claim for unemployment contributions and the Federal claim correspondingly reduced.

The **second** possibility is the treatment accorded the offset credit by the Federal District Court in the case at bar (65 F. Supp. 763), where the court discusses and analyzes the decision of the United States Supreme Court in *People*

ex rel Gordon v. *United States, supra.* The District Court ordered that 10 per cent of the Federal claim be paid first, and that the balance be paid to the State, with the offset credit resulting therefrom reducing the Federal claim correspondingly. The Court said: (referring to *People ex rel Gordon* v. *United States*)

> "Mr. Justice Black had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States had not given the taxpayer the option to make payment to Illinois instead of to the United States. That, as I have said, is a problem less of priorities than of the discharge of alternative obligations and of marshalling assets. *In other words, Mr. Justice Black did not specifically consider whether a possible arrangement of claims ought not to be as follows: in a definitely preferred category the claim for capital stock taxes, the claim for Title VIII taxes, and the claim for 10 per cent of Title IX taxes;* and in what I can best describe as a suspended category the claim for 90 per cent of Title IX taxes and the claim for State unemployment compensation contributions,—the taxpayer *or his assignee or a court charges with administration of insolvent estates having the right to elect to pay the State and defeat 90 per cent of the United States Title IX claim;* * * *" (Emphasis ours.)

Using the same illustration as in the preceding possibility, where the Federal claim was $10,000, the State claim for contributions was $9,000, and the funds available for distribution amounted to $5,000,—under the treatment of the Massachusetts court, the Federal government would receive 10 per cent of its claim or $1,000 and the balance of available funds would be applied to the State claim, giving the State $4,000 or 45 per cent of its claim.

The inequities of this method are apparent in that it allocates a disproportionately large share of available funds for the costs of administration at the expense of the

State funds which are devoted to the payment of benefits, the actual purpose of the legislative program. This is contrary to the intention of Congress which regarded 90 per cent as the proper share to safeguard the funds for the payment of benefits.

Thus, although under the Illinois Supreme Court decision, the State would be entitled to have available funds first applied to its claim, we believe the most equitable arrangement is the **third** possible method of handling the offset: **Under this method the available funds would be allocated as follows: 10 per cent of the available funds to the Federal government, and 90 per cent to the State government,** the latter amount being offset against the Federal claim. This procedure is in keeping with the underlying purposes of the legislation. It gives consideration to the Federal government for the amount which is to be used for the administrative purposes, and to the State government in the maintenance of funds for the payment of unemployment benefits, and **the allocation is made in the proportion which Congress considered would give protection to both the costs of administration and the State funds from which benefits are to be paid.**

Using the same illustration with the government claim for $10,000, the State claim for $9,000, and the available funds of $5,000, the allocation of available funds would be as follows: 10 per cent of the available funds or $500 to the Federal government, and 90 per cent of the available funds or $4,500 to the State government.

It is to be noted that this last arrangement would **not** be in derogation of the Federal priority, since any amount which is paid to the State may be offset against the Federal claim and the Federal claim is correspondingly satisfied. Thus, in the above example, by means of the offset credit

the Federal claim is reduced and satisfied to the extent of $5,000, which is exactly the same amount that it would be reduced and satisfied if the full amount of cash were paid directly to the Federal government.

Such action does not "frustrate the government's priority under Section 3466." It is clear that Congress intended and actually preferred that up to 90 per cent of its claim for unemployment taxes be satisfied in this manner by payment to the State, and such payment is "satisfaction" of the Federal claim within the terms of Section 3466.

In view of these considerations we respectfully submit that insofar as Title IX (Federal unemployment) taxes are concerned, the Federal government's priority extends only to 10 per cent of the face of its claim (or 10 per cent of the funds available) because 90 per cent of its claim has already been "satisfied" within the meaning of R. S. 3466 by the assignee's payment to an approved State unemployment fund.

CONCLUSION.

For the reasons above stated, the State of Illinois, as *amicus curiae*, most respectfully prays that the judgment of the Circuit Court of Appeals in this case be reversed and the cause be remanded with appropriate directions.

Respectfully submitted,

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pp. 5, 7, 11, 19, 22

SUPREME COURT OF THE UNITED STATES

No. 157.—October Term, 1947.

Commonwealth of Massachusetts, et al., Petitioners, *v.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 19, 1948.]

Mr. Justice Rutledge delivered the opinion of the Court.

This case is for all practical purposes a renewal of the litigation recently here in *Illinois* v. *United States*, 328 U. S. 8, and the companion case of *Illinois* v. *Campbell*, 329 U. S. 362. The former unanimously held that the United States has priority, by virtue of Rev. Stat. § 3466, 31 U. S. C. § 191, for payment from an insolvent debtor's estate of federal insurance contribution taxes under Title 8 and unemployment compensation taxes under Title 9 of the Social Security Act, 49 Stat. 620, as against a state's claim for unemployment compensation taxes imposed by its statute conforming to the federal act's requirements. The *Campbell* case, which was reargued on other issues, rested on this ruling for disposition of the common issue concerning the effect of § 3466.

The facts are substantially identical with those in *Illinois* v. *United States*,[1] except in two respects. One is that

[1] Here, as in that case, the debtor made a common-law assignment for the benefit of creditors. The assignee here realized $1,135.11 from sale of the assets. The claim of the United States for Title 9 taxes amounted to $963.08; for Title 8 taxes, $690.05; and for capital stock taxes, $21. The commonwealth's claim was for $803.72 in unemployment taxes. Within the time allowed, but for intervention of the insolvency, the assignee paid the state's claim in full and then paid the remaining assets of $331.39 to the collector. He applied this sum on account of the Title 8 taxes, thus leaving unpaid the federal claims for capital stock and Title 9 taxes as well as $358.66 plus interest on the Title 8 claim.

the fund available here for distribution is more than sufficient to pay either the Title 8 or the Title 9 taxes, though inadequate to pay both, while in *Illinois* v. *United States* the fund was not large enough to satisfy either tax in full. Here too the debtor's assignee has paid to the commonwealth the full amount of its claim,[2] while in the *Illinois* cases the fund remained in the assignee's hands for distribution.

The District Court sustained the federal priority for capital stock and Title 8 taxes in full, and for 10 per cent of the Title 9 claim. It therefore deferred payment of any part of the state's claim until those claims were fully paid. But the court held the United States not entitled to priority for the remaining 90 per cent of the Title 9 claim, on the ground that Title 9, § 902,[3] gives the assignee "the alternative right" to pay that amount to an approved state unemployment fund. Accordingly the judgment ordered Massachusetts to pay over to the United States, from the $803.72 received from the assignee, sufficient funds to satisfy in full the federal priorities sustained, and to retain the small balance remaining after making those payments to apply on its claim for 90 per cent of the Title 9 taxes. 65 F. Supp. 763. This action was taken in the view that, while our previous decisions had sustained the federal priority for

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[2] The commonwealth in effect has undertaken to indemnify the assignee, by paying over to the United States the $803.72, if the payment to the state should turn out to have been erroneously made. The United States has agreed that if it prevails the judgment shall be limited to $803.72.

[3] The original § 902, 49 Stat. 639, provided that the taxpayer might credit against Title 9 taxes 90 per cent of his contributions under an approved state program. Subsequent amendments did not alter the conception of a basic 90 per cent credit. See, *e. g.*, notes 13, 15. The present "credit against tax" section is incorporated in the Internal Revenue Code, 26 U. S. C. § 1601.

the capital stock and Title 8 taxes, they had not determined the question for Title 9 claims.[4]

However, on appeal by both parties, the Circuit Court of Appeals held the United States entitled, under the *Illinois* rulings, to priority for the full amount of all its claims, including the Title 9 taxes. That court therefore affirmed the District Court's judgment except insofar as it denied the Government's Title 9 claim. As to this it reversed the District Court's ruling. 160 F. 2d 614.

Because of the obvious confusion concerning the effects of our prior decisions and the asserted differences between this case and the *Illinois* cases, certiorari was granted. 332 U. S. 754.

I.

Massachusetts seeks to retain the entire $803.72 she has received, in priority to all the federal claims. She agrees with the district court that § 902 gives the taxpayer an "optional right" of payment, but does not accept its allocation creating priorities for all federal claims except 90 per cent of the Title 9 taxes. To sustain this broad claim would require reversal of both of the *Illinois* decisions. In no other way, on the facts, could Massachusetts retain the whole amount she was paid.[5]

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[4] The District Court thought that in *Illinois* v. *United States*, the Title 9 issue had become moot either before or as of the time the case reached this Court, and that therefore we "had no occasion to consider the problem whether as to 90 per cent of the amount due for Title IX taxes the United States [by § 902] had not given the taxpayer the option to make payment to Illinois instead of to the United States." 65 F. Supp. 763, 765. The court thus regarded the Title 9 question as left open and "nicely analyzed . . . to be one not of priority but of alternative obligation." *Id.* at 764.

[5] Since the insolvent's assets are not large enough to pay either the Title 8 or the Title 9 claim and leave enough to pay the state claim in full. See note 1.

In the brief Massachusetts states the federal question as being whether the assignee may "make payment of the State unemployment

Illinois as *amicus curiae* takes a narrower position, conceding that the *Illinois* cases stand as decisive adjudications of priority for Title 8 taxes but disputing that effect for Title 9 claims.[6] This position seeks an allocation paying the state's claim after the Title 8 and other federal claims, including 10 per cent of the Title 9 taxes, but before or rather in "satisfaction" of the remaining 90 per cent of them.[7]

Notwithstanding their substantial differences, the two states rest their respective positions on the same basic arguments, which upon examination turn out to be identical with those vigorously presented by Illinois in the earlier cases, except for wording and detail. Much is made of the fact that here the debtor's assignee has paid to the commonwealth the full amount of its claim, while in *Illinois* v. *United States*, the fund remained in the assignee's hands. Both states urge that § 902 gives the taxpayer, and here his assignee, the "optional right" of payment to the state. Moreover, with respect to the requirement of Rev. Stat. § 3466 that "the debts due the United States shall be first satisfied," it is said that payment to the state with resulting credit to the United

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tax to the exclusion of the Federal Government claim for Title IX taxes *or any other taxes due the Federal Government* from the taxpayer?" (Emphasis added.)

[6] Illinois has appeared with leave, both by brief and in the oral argument. It neither expressly disclaims nor expressly supports Massachusetts' broad position for reversal.

[7] On the facts, see note 1, after paying the capital stock claim, the Title 8 claim and 10 per cent of the Title 9 claim, this would leave $327.75 to apply on the state's claim; and hence require Massachusetts to pay over to the United States $475.97 plus interest from the $803.72 she has received, in order to complete the payment in full of the Title 8 claim.

Actually this represents the District Court's specific allocation, not exactly that of either Massachusetts or Illinois. Each would apply a somewhat different method of allocation. See note 20.

States for 90 per cent of the Title 9 claim "satisfies" the Government's debt as much as payment to it in cash.

In the *Illinois* cases the foundation for the state's claim to be paid in preference to any of the federal claims lay in the credit provision of § 902, which is the identical provision for "optional payment." There was no question whatever that § 902 gave the taxpayer the "alternate right." But the precise issue in both cases was whether that right had been cut off by Rev. Stat. § 3466 when he became insolvent.

Obviously there could have been but little point or effect to our decisions if, despite them, the assignee could have turned around immediately and deprived the Government of the priorities established simply by exercising a right to make the optional payment to the state. Nor would the decisions have been much more sensible or effective, had they purported to sustain the federal priorities when the assignee has retained the fund, but to disallow them if he has paid the state before the federal claims are filed. We made no such ineffective or capricious rulings. The decision was broadly that by intervention of the insolvency and the consequent bringing of Rev. Stat. § 3466 into play, the taxpayer's right to pay the state and take federal credit had been cut off.[8]

Our decisions went to the merits of that right and not merely to rule that the state was not a proper party to enforce its exercise. The taxes due the United States were held to be debts; and by virtue of § 3466 the debtor's prior obligation attaching as of the date of his insolvency was to the Government, not to the state. It followed necessarily that the assignee could not "satisfy" it by paying the state and giving the Government "credit."

[8] See Part III. The federal priority under § 3466 attaches from the time the insolvent debtor transfers or loses control over his property. *Illinois* v. *Campbell*, 329 U. S. 362, 370; *United States* v. *Waddill Co.*, 323 U. S. 353, 355–358; *United States* v. *Oklahoma*, 261 U. S. 253, 260.

This was the very question at issue and the one adjudicated. The "alternate right" contention and the one that "satisfied" in § 3466 means "credit" are only verbal redressings of the basic issue decided in the *Illinois* cases.

II.

This is as true of the argument's bearing on Illinois' narrower position as it is for Massachusetts' broader one. But Illinois, apparently with Massachusetts' support, brings forward to sustain the less sweeping attack the additional contention that the *Illinois* decisions did not adjudicate Title 9 priority, although purporting to do so. Moreover, the facts present this narrower issue of distinguishing between Title 9 and other federal claims in sharper factual focus than did the *Illinois* cases. For if the capital stock and Title 8 claims are first paid in full, as the District Court required, a small balance of the fund will remain, to be applied either in part payment of the federal Title 9 claim or in some form of allocation between it and Massachusetts' claim. This was not true of *Illinois* v. *United States,* or indeed of *Illinois* v. *Campbell,* in the posture in which that case was brought here.

The principal argument is that the Title 9 taxes, though litigated in the Illinois courts, were not involved on the facts in the *Illinois* cases as they came to and were decided by this Court. Hence it is said we did not acquire jurisdiction over the Title 9 claims. The argument is correct concerning *Illinois* v. *Campbell.*[9] But it is surprising as

[9] The state supreme court's judgment had sustained the federal priority for Title 8 taxes, ordering them paid first and the small remaining balance of about $150 to be paid to the state. This left the Title 9 taxes unpaid. The court denied priority for that claim because it fell within the explicit exception of § 602 (b) of the Revenue Act of 1943. See text *infra* at notes 13, 14. The Government's failure to apply for certiorari as to the $150 eliminated the Title 9 issue from the case in this Court.

applied to *Illinois* v. *United States*, in view of the state supreme court's adverse decision on the Title 9 issue; Illinois' explicit application for certiorari on that issue and argument on the merits here to reverse it;[10] the necessity on the facts for the state to bring the question up and secure reversal in order to establish its claim;[11] and finally our opinion's clear and explicit terms, indeed emphasis, in deciding the Title 9 issue, together with the Title 8 one, against Illinois.[12]

the state court's decision;

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[10] Illinois almost uniformly put the issues as involving Title 8 and Title 9 taxes indiscriminately. Thus, in stating "The Questions Presented," the petition for certiorari spoke of priority for "Social Security excise taxes and Capital Stock taxes," necessarily encompassing Title 8 and Title 9 levies. This was repeatedly true of the state's brief. Further, the petition at one point said: "In holding that the claim of the petitioner was subordinate to the claims of the United States for capital stock tax and for taxes arising under Titles VIII and IX of the Social Security Act, the Supreme Court of Illinois looked to form, not substance, and disregarded the character and significance of petitioner's claim." The Government's briefs were equally positive in seeking disposition of the Title 9 claim.

[11] The federal claims asserted were as follows: Capital stock taxes, $58.73; Title 8 taxes, $1,065.52; Title 9 taxes, $1,284.36; all plus interest from the date due. The Illinois claim for state unemployment compensation contributions was $721.29. And the fund available to satisfy all these claims was $1,010.81.

Since the assets were insufficient to pay in full either the Title 8 or the Title 9 claim, Illinois had to override both to establish her claim. Illinois recognized this both by her application for review and by the broad argument that the state claim was tantamount to a federal tax and the credit provisions of § 902 exempted it completely from the priority of Rev. Stat. § 3466 for all federal taxes, not simply one.

[12] The opinion in *Illinois* v. *United States* explicitly stated: "The claim of the United States is for federal unemployment compensation taxes under Title 9 and federal insurance contributions taxes under Title 8 of the Social Security Act, 49 Stat. 620." 328 U. S. 8, 9. The opinion throughout treated Title 9 taxes on a parity with those under Title 8. We accepted fully the state's view that

The idea that the state court decided only the Title 8 issue completely misconceives its action, and serves only to confuse the judgment in that case with the one in *Illinois* v. *Campbell*. Indeed it seeks to infuse into the former the latter's denial of Title 9 priority. Not only is this wholly incompatible with Illinois' earlier position; it ignores the fact that the state court disposed of the Title 9 issue in both cases, but in opposite ways on entirely different facts and legal issues.

In *Illinois* v. *Campbell*, the state court did not reach the basic question of the force of Rev. Stat. § 3466 to create priority for federal Title 9 claims; rather, it expressly avoided deciding that question. 391 Ill. 29, 32. This was because the insolvent's assets were in the hands of a court-appointed receiver, *id.* 31, and in that situation § 602 (b) of the Revenue Act of 1943, 58 Stat. 77,[13] expressly allowed the receiver to pay the state and

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the credit or "optional payment" provision of § 902 was designed to stimulate the creation of sound state systems. 328 U. S. 8, 10. See *Illinois* v. *Campbell*, 329 U. S. 362, 367, n. 5. But we rejected the argument that the state claim was tantamount to a federal one and said: "But we cannot agree that Congress thereby intended in effect to amend § 3466, by making its priority provisions inapplicable to state unemployment tax claims." 328 U. S. 8, 11. The ruling applied to both types of tax without distinction.

[13] This section was one of the relaxing amendments, see Part IV, to Title 9, § 902, of the Social Security Act. For Title 9 taxes due for the years 1939, 1940, 1941 and 1942 it allowed credit up to 90 per cent, without regard to previous failure to pay as required, if the assets of the debtor had been, during the period specified, "in the custody or control of a receiver, trustee, or other fiduciary appointed by, or under the control of, a court of competent jurisdiction."

Section 602 (a) of the 1943 Act, 58 Stat. 77, also created a similar relaxation of § 902, for Title 9 taxes due for the years 1936, 1937 and 1938, with credit limited however to 81 per cent, when the state payments for those years were made after December 6, 1940. This section formed the basis for a claim to credit in *Illinois* v. *United States* rejected by the Illinois court. See note 15.

take credit up to 90 per cent of the Title 9 tax. The Illinois Supreme Court expressly so held, and on this ground alone denied the federal Title 9 claim. 391 Ill. 29, 34. The effect was to rule that § 602 (b) created a legislative exception to § 3466, limited to payments by such receivers, within the times and for the tax periods specified, up to 90 per cent of the Title 9 taxes.[14]

But § 602 (b) did not apply in *Illinois* v. *United States*, because the insolvent's assets were held by a common-law assignee, not a court-appointed official.[15] So holding, 391 Ill. at 37, the Illinois court went on to rule that the federal claims for Title 8 and Title 9 taxes were debts within the meaning of § 3466 and were therefore entitled to priority over the state's claim. It not only rejected

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[14] See also Part IV. The court, however, in giving directions for the decree to be entered by the trial court ordered the federal Title 8 claim paid first in full "and any balance remaining" to the state. 391 Ill. at 46; see also *id.* 42. Thus apparently it inadvertently lost sight of the fact, earlier expressly noted, *id.* 34, 39, that § 602 (b) allowed the receiver to take credit only up to 90 per cent of the Title 9 taxes.

This oversight seemingly was responsible for the court's failure to award priority to the United States for 10 per cent of its Title 9 claim, from the small balance remaining after paying the Title 8 taxes. Cf. note 9. Had this amount, some $128, also been awarded to the United States, roughly only $22 would have been left for the state. The opinion gave no consideration to this question, and by the Government's failure to apply for certiorari regarding it we were prevented from considering it.

[15] An additional reason was that the taxes against which credit was claimed were not taxes for the years to which § 602 (b) expressly limited the credit it allowed. Instead § 602 (a) of the 1943 Act, see note 13, allowed conditional credit for the tax years involved in *Illinois* v. *United States* and the state sought to secure it. But the Illinois court held § 602 (a) also inapplicable on the facts and denied the 81 per cent credit because the assets were in the hands of a common-law assignee, not in the custody or control of a court-appointed receiver or other official as the section required for the credit to be available. 391 Ill. at 37.

the argument that the credit provision of Title 9, § 902, made that claim "in reality a claim of the Nation . . . tantamount to a claim of the United States,"[16] but also carefully guarded the wording of the opinion's dispositive paragraphs[17] and the directions given the trial court for entering the judgments on remand so as to differentiate the two cases and to avoid any direction that the fund in *Illinois* v. *United States* apply on only one of the federal claims.[18] The judgment thus left the United States free to apply it in partial satisfaction of either claim or both.

This was also the effect of our own decision and judgment. It generally and without distinction between the Title 8 and Title 9 claims adjudicated priority for both. As in the Illinois court's decision, no restriction was placed upon allocation of the fund, nor is any hint to be found in the opinion that such an allocation was intended. Indeed we were not asked to make one and to have done so would have disregarded the basic position of both parties, each of which sought a full and favorable dis-

[16] 391 Ill. at 39, 40; cf. 328 U. S. at 11. The Illinois court held "the full amount" of the payroll (Title 9) taxes to be "taxes due the Federal government." In the first instance, it said, this was true of "100 per cent of the taxes levied," which "continues to be taxes due the Federal government either until it is all paid to the Federal government, or 90 per cent is paid to the State and the balance to the Federal government." The provisions for credit, the opinion continued, "do not change the character of the taxes imposed. They are still taxes due the Federal government and constitute a debt due to the United States within the purview of section 3466 of the Revised Statutes." *Id.* 40, 41.

[17] 391 Ill. 42, 46.

[18] *Ibid.* The order for judgment in *Illinois* v. *United States* merely reversed the trial court's judgment and remanded the cause "with directions to enter a decree finding that the United States is entitled to priority of payment to the extent of the funds on deposit, and ordering distribution accordingly." 391 Ill. at 46. See note 14 for the directions in the *Campbell* case.

position of the controversy including decision upon all the issues presented.[19]

It is true that, as in the Illinois Supreme Court, the decision and judgment could have been made on the narrower basis that the Title 8 claim was more than sufficient to exhaust the fund, and therefore to sustain the priority for that claim alone would dispose of the case. But this would have been equally true of the Title 9 claim. Neither claim was either more or less essential to decision than the other, indeed decision upon both was necessary to a judgment favorable to Illinois. To have eliminated either would have required some indication of that purpose. Since none was given, it cannot be said that the judgment rested on the one ground or claim more than the other.

While therefore the case is one which might have been decided on either of two independent grounds favorably to the Government, it is neither one in which that course was followed nor one which could have been determined the opposite way in that manner. Instead, as we were asked to do and rightly could do on the record and the issues, we decided both issues, and the judgment rested as much upon the one determination as the other. In such a case the adjudication is effective for both. *United States* v. *Title Ins. Co.*, 265 U. S. 472; *Union Pacific Co.* v. *Mason City Co.*, 199 U. S. 160; see *Richmond Co.* v. *United States*, 275 U. S. 331, 340.

III.

Finally, it is urged that in *Illinois* v. *United States* we had no occasion to consider and hence our opinion did not

[19] See notes 10, 11. The cases were obviously test cases designed to settle the question of priority generally, *i. e.*, not merely for one but for all federal taxes and thus provide a certain basis for administration of the Social Security Act in both its insurance and unemployment compensation features.

discuss whether in a case like this, where the fund is more than sufficient to pay all federal claims except 100 per cent of the Title 9 claim, the balance remaining after paying those other claims must go first to pay the federal Title 9 claim in full, or may be allocated between that claim and the state claim to pay 10 per cent of the federal claim first and then to apply what remains on the state claim.[20]

Closely related to this, though not involved on the facts in *Illinois* v. *United States* or here,[21] is the Government's apparent concession that if all the federal claims are paid in full, including 100 per cent of the Title 9 claim, and any balance then remains in the fund, the insolvent taxpayer is nevertheless given the right by § 902 to pay that balance to the state and receive credit on his federal Title 9 tax. In such a case, it is said, the Government would be overpaid on Title 9 taxes and obligated to refund the excess. Then the taxpayer could apply the amount received in further payment of the state claim, with corresponding federal credit, overpayment and refund, only to start the cycle again and repeat it until he had paid the state its claim in full and received the entire 90 per cent credit.[22] Hence in this situation, it

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[20] Cf. the District Court's view, note 4 *supra;* and note 7. Illinois and Massachusetts in fact urge different methods of allocation, each differing from the one applied by the District Court. From the funds available for Title 9 distribution, Massachusetts would pay the state claim first and correspondingly reduce the federal claim. Illinois would make a *pro rata* distribution of 10 per cent of the available funds to the Federal Government and 90 per cent to the state, while the District Court would pay the federal 10 per cent first and apply the balance remaining on the state claim.

[21] Since the fund was not large enough in either case to pay all the federal claims in full.

[22] Hypothetical examples are stated in the District Court's opinion, 65 F. Supp. 763, and in the briefs filed here.

is said, short-cut distribution might well be made to the state in the first place, to eliminate the cycle.

The effect of the concession, if it is valid, goes far toward cutting the ground from beneath the Government's basic position.[23] That effect is heightened by the further surprising statement in its brief that in a case like this, not covered by the concession, compliance with the credit conditions of § 902 becomes impossible "not because Section 3466 operates to exclude Section 902 or to nullify it, but because the terms of Section 902 itself deny it [credit] where no payment can be made." The statement would be understandable, if it had been that § 3466 and § 902 both work to deny the credit in this situation. But to say that § 3466 has no effect to cut off the right to credit either in the present situation or in the different hypothetical one stated is to take away the basic grounding of all federal priority as against the state's claim.

The concessions cannot be accepted. In the first place, the effect of § 3466 depends on the fact of insolvency, not on the degree of it as the first concession seems to contemplate. And it is only by force of § 3466 that the Government has any priority at all. Section 902 may work to deny credit, if its conditions for credit are not fulfilled. But it does not give federal priority over valid state claims. Moreover, both concessions are altogether inconsistent with the basic decisions in the *Illinois* cases and the grounds on which they rested. The matter requires brief restatement. It is one which goes funda-

[23] Possibly the concession was intended as an argumentative alternative to other and broader positions. In any event, we are not bound to accept it as either sound or conclusive of the litigation. It is not, even in terms, a confession of error.

These observations apply equally to the Government's further damaging statement set forth in the sentence following the one to which this footnote is appended.

mentally to the effect of Rev. Stat. § 3466, as distinguished from, though not unrelated to, § 902 of the Social Security Act. These of course are entirely distinct statutes, with different functions.

Rev. Stat. § 3466 gives priority explicitly for "*debts* due to the United States" and the priority given is in terms absolute, not conditional. Once attaching, it is final and conclusive. A long line of decisions has held that taxes due the Government are "debts" within the meaning of the section.[24] In the *Illinois* cases we applied this ruling to Title 8 and Title 9 taxes as against the state's claim for "contributions." Prior decisions also have held that

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[24] The federal priority has been uniformly sustained for tax claims. *United States* v. *Waddill Co.*, 323 U. S. 353 (unemployment compensation taxes and a debt arising out of a Federal Housing Administration transaction); *United States* v. *Texas*, 314 U. S. 480 (gasoline taxes); *New York* v. *Maclay*, 288 U. S. 290 (income taxes and a claim for expenses incurred in the replacement of a buoy damaged by the insolvent); *Spokane County* v. *United States*, 279 U. S. 80 (income taxes and penalties); *Price* v. *United States*, 269 U. S. 492 (income taxes and customs duties); *Stripe* v. *United States*, 269 U. S. 503 (income, excess profits, and capital stock taxes).

Judgments recovered by the United States also are debts entitled to priority. *United States* v. *Knott*, 298 U. S. 544 (against surety on estreated bail bonds); *Hunter* v. *United States*, 5 Pet. 173 (against surety).

Other debts for which the Government has been held to have priority under § 3466 are: *United States* v. *Remund*, 330 U. S. 539 (emergency loans made by Farm Credit Administration); *United States* v. *Emory*, 314 U. S. 423 (sum due on note held under the National Housing Act); *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483 (Indian funds deposited in bank); *United States* v. *National Surety Co.*, 254 U. S. 73 (losses where contractor defaulted); *Bayne* v. *United States*, 93 U. S. 642 (misappropriated Army paymaster funds); *Lewis* v. *United States*, 92 U. S. 618 (funds held by Navy disbursing agents); *United States* v. *State Bank of North Carolina*, 6 Pet. 29 (bonds for customs duties); *United States* v. *Fisher*, 2 Cranch 358 (claim against endorser of protested bill of exchange).

the priority attaches as of the time of the insolvency,[25] a ruling also applied in the *Illinois* cases.

But if credit can be taken after § 3466 attaches, *i. e.*, after insolvency, effective to set aside the federal priority up to 90 per cent of the Title 9 claim, the priority to that extent becomes conditional, not absolute. Its effectiveness then becomes contingent upon the happening of subsequent events, namely, the concurrence of the conditions of § 902 for paying the state and taking the credit together with the taxpayer's election to do this. In short, § 3466 never conclusively attached and § 902 works retroactively on occurrence of those contingencies to upset the priority.

A further effect might be to make the statute applicable beyond the scope of the term "debts due to the United States." For if the taxpayer's subsequent election can destroy the priority retroactively, not only the priority but the "debt" itself becomes contingent. And it is at least doubtful on the statute's wording that obligations wholly contingent for ultimate maturity and obligation upon the happening of events after insolvency can be said to fall within the reach of "debts due" as of the time of insolvency.[26]

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[25] See note 8 *supra*.

[26] It has been held that the term "debts due to the United States" should be construed with some liberality. See, *e. g.*, *Price* v. *United States*, 269 U. S. 492, 500; *United States* v. *Emory*, 314 U. S. 423, 426. And there is apparently no decision expressly ruling the matters of contingency of the obligation or of the priority upon subsequent events not certain. Cf. *United States* v. *Marzen*, 307 U. S. 200. But the fact that the problem has not squarely arisen in the long history of § 3466 and that all of the decisions sustaining the priority were for debts clearly due and owing, adds force to the clear inferences implicit in the statute's wording, *viz.*, that Congress not only created a conclusive priority attaching as of the time of insolvency but in doing so drew the line for its operation close to, if not at, the commonly accepted meaning of "debt" as distinguished from other forms of obligation.

However this may be, we know of no previous application of § 3466 creating such a conditional priority.[27] Nor do we see how one could be made consistently with the section's terms or purposes. The only such consistent application would seem to be one giving the Government the prior and indefeasible right to take the fund available, up to the amount necessary to pay its claim as of the date the priority attaches, not as it may be affected by later contingencies other than payment.[28] In enacting § 3466 Congress gave no indication whatever of intent to create defeasible priorities.

The defeasance conceded possible by the Government, therefore, together with the further conceded ineffectiveness of § 3466 [though not of § 902] in circumstances like these to deny the right to credit, destroys the fundamental character of the priority created by § 3466 and thereby removes the foundation from the Government's basic position, which is that § 3466 applies as of the time of insolvency to create the priority it contemplates. Through these concessions the section is made, by virtue of the effect of § 902, to create only a defeasible federal priority as against claims for credit. This actually is but another way of making § 902 effective as an exception to Rev. Stat. § 3466, like § 602 (a) and (b) of the Revenue Act of 1943, noted above in Part II.

This of course was Illinois' earlier position, rejected by this Court. If that position is now to be accepted, we do not see how § 3466 can be regarded as applying to Title 9 taxes or, indeed, how the effect of treating § 902 as an exception can be limited to Title 9 taxes.

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[27] See notes 24, 26.

[28] Again the distinction between "payment" and "satisfaction" becomes pertinent. To construe the term "satisfied" in § 3466 as being fulfilled by taking subsequent credit, as the states urge, would be to qualify the word "debts" so as to make it include conditional obligations.

For if § 902 works as an exception to § 3466, then Illinois was right in the first place, and the exception would seem to apply to all federal taxes, not just the one.[29]

Accordingly, the Government's concessions cannot be accepted as consistent either with our prior decisions or with its own basic position in the *Illinois* cases and this one. That position, apart from the concessions, rests ultimately on § 3466 and its applicability to these claims. This necessarily denies that § 902 creates an exception to § 3466 or a qualification inconsistent with its terms. The qualifications now conceded are not consistent with those terms, for they do not contemplate the tenuous, destructible sort of "priority" the concessions involve.

Moreover, the fact that in *Illinois* v. *United States* we did not discuss expressly the 10–90 per cent distribution of Title 9 taxes now suggested does not mean that our decision did not encompass that possibility. It extended generally to all cases where credit is sought after insolvency. It was federal *priority* attaching as of the time of insolvency that we adjudicated, not something less. As we have indicated, in making the adjudication we neither were nor could have been ignorant of § 902's allowance of the taxpayer's election. Our decision held that right cut off by the incidence of § 3466 at the time of insolvency. Any other would have been wholly incon-

[29] Congress, of course, could provide for federal priority as to all taxes except Title 9 claims. But, apart from the explicit exceptions created by § 602 (a) and (b) of the Revenue Act of 1943 with reference to funds of insolvents in the hands of court-appointed officials, see Part II, notes 13, 15, Congress has not done so either by any wording or intent of Rev. Stat. § 3466, nor in our view by § 902 of the Social Security Act. We do not think that it intended to make the state's claim subject to all other federal taxes, but prior to all but 10 per cent of the Title 9 taxes. See text *infra* Part IV. No instance has been found where § 3466 has been applied to create such a selective priority as among federal claims qualifying as "debts" within the meaning of § 3466.

sistent with the ruling that § 3466 applies as against the state's claim for "contributions" or the taxpayer's right to make them after the incidence of his insolvency.

IV.

We have taken pains to state the effect of our previous decisions, because of the confusion concerning them and the fact that two states have earnestly presented the questions. Ordinarily this would end the matter. But, again for those reasons, we turn briefly to the merits and to the question whether the *Illinois* decisions should now be reversed.

Apart from the arguments already discussed, two stand out as reasons for the change sought. Both reiterate contentions rejected in the *Illinois* cases. The primary one is that the objects of the legislation will be defeated unless the change is made, namely, the encouragement of the state systems and correspondingly of taxpayers to make "contributions" to state funds, thereby insuring that the moneys so paid in will go out for unemployment benefits rather than into the Treasury as revenue. The second is a heightened emphasis on the subsequent amendments to § 902 as showing Congress' intent to waive, in progressively broadening scope though still only in specified situations, the original limitations of § 902 upon securing credit.[30]

From the second contention is drawn the conclusion that Congress, by its carefully, even meticulously drawn relaxations, meant credit to be given not only in the circumstances so carefully prescribed but also in other situations not within those prescriptions. This conclu-

[30] Of the several amendments, none is applicable to this case. The only ones relating expressly to insolvents' estates are those noted in Part II, see notes 13, 15 and text, 31, applying to payments by court-appointed receivers, etc.

sion when added to the first argument amounts in sum to reiterating that the state exaction is "tantamount to a claim of the United States," and that not to disregard the tax and credit structure in which Congress molded the Act would be to "observe the form and ignore the substance of the legislation."

We shall not repeat the answers made in *Illinois* v. *United States*, except to say that "while the state and federal governments were to cooperate, the underlying philosophy of the Federal Act was to keep the state and federal systems separately administered." 328 U. S. 8, 11. To the considerations there stated, however, we now add the following ones, not expressly mentioned in the earlier opinion, prefaced however with the observation that the grounding of each plea for reversal affords basis for conclusion against that action as well as in its favor.

Thus the many relaxations which Congress has made respecting the conditions permitted for taking credit, by force of their very number and careful limitation, show that Congress was not offering a broadside exemption to be applied in situations, such as this case, other than those specifically defined.[31] Rather the intention disclosed is to limit the credit to the precise situations specified for allowing it. That view accords with Congress' deliberate choice of the tax and conditional credit devices for fram-

[31] Thus, as has been noted, the provision for payment and credit given by the Revenue Act of 1943, §§ 602 (a) (3) and (b), 58 Stat. 77, is limited to situations where an insolvent's assets were under the control of a court or its appointed official, ~~not where they were in the hands of a common-law assignee.~~ Congress quite obviously had the insolvent taxpayer in mind. But even so it excluded nonjudicial custodians of his assets by its failure to extend the relaxation to them. The omission cannot be taken to have been unintentional. The necessary effect in the one case was to create a legislative exception to § 3466, in the other to deny it by the withholding of the like privilege. So also with the other easing amendments.

ing the Act's structure. These are well-known techniques, adopted apparently in this instance for constitutional as well as administrative reasons.[32] But those very motivations warn us to be wary of disregarding the form which Congress has chosen advisedly, in order to substitute a substance we can only be doubtful it may have intended.[33]

But it is said that if payment to the state is not allowed and the right to receive credit is cut off, the money will not be paid out in unemployment benefits but will go into the Treasury as general revenue; the states will be compelled to make payments to the insolvent's employees; and thus the primary purposes of the Act will be defeated. There are several answers.

One is that Congress has guaranteed the solvency of the state funds and, if need be, the revenues thus paid into the Treasury will be available for that purpose.[34] Moreover, but especially in view of this guaranty, it

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[32] Cf. *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

[33] It is precisely in matters where Congress has used the tax and credit technique that disregarding the form chosen offers the gravest dangers of perverting a statute's purposes. We think that possibility is equally as great here from ignoring Congress' expressed intent, both in limiting the right of credit to defined situations and in its failure expressly to qualify the broad policy of § 3466, as would be the other one of reaching its purpose by giving effect to its explicit limitations.

[34] Sections 904 and 1201 of the Social Security Act, 58 Stat. 789, 50 U. S. C. App. Supp. V, §§ 1666–1667, as amended, Pub. L. No. 379, 80th Cong., 1st Sess., §§ 4–5. Section 904 established a federal employment account in the United States Treasury, and appropriated the excess of Title 9 taxes over unemployment administrative expenses to such account. Section 1201 authorized loans from such account to the states for unemployment insurance payments when a state's unemployment insurance fund becomes dangerously low, repayment of such advances not being required unless the state fund regains stable condition. See S. Rep. No. 477, 80th Cong., 1st Sess. 9–10.

may be more likely that the funds, if paid into the Treasury rather than to the state, will be saved for application to the Act's purposes. For there is no assurance, if the state's prior right to them is once established, that they will go for the payment of unemployment benefits.

It must be remembered that we are dealing with an insolvent's assets. And the states have statutes by which such assets are distributed according to local priorities whenever § 3466 is not operative. Only a few of them place unemployment benefits at the top.[35] Depending therefore upon the number and the amounts of claims standing ahead of the unemployment benefit claims in the particular state would be the certainty or probability of payment of the latter. In short, reversing our decisions and conceding the validity of the state's position, either as to Title 9 taxes alone or as to all federal taxes, would give no definite and certain assurance that the funds thus acquired by the states would go to satisfy the Act's purposes.[36] In many cases payment to the state would be the means of diverting them to wholly extraneous objects. Especially would this be true when smaller employers within the Act's terms are involved, as they seem to be much more often than others.[37] In the absence

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[35] See, *e. g.*, Mass. Ann. Laws, c. 151A, § 17 (1942); Cal. Gen. Laws, Act 8780d, § 46 (1944); Iowa Code, § 96.14 (3) (1946); Okla. Stat., tit. 40, § 224 (c) (1941).

[36] Unless in this case we should undertake to say, as we have not been asked or authorized to do, that by implied force of § 902, state priorities are relegated to a position inferior to the taxpayer's right to pay the state and take federal credit. Nothing in the statute suggests that Congress intended to give the taxpayer or this Court the power thus to disorder the states' schemes of priorities.

[37] If the litigated cases, of which the ones that have come here seem to be typical, and common observation may be taken as fairly accurate bases for judgment.

It is true that in some cases of insolvency the business continues without being wound up. But this perhaps is much more often the

of any explicit or implied direction we do not believe that Congress intended to require that the state's claim for unemployment contributions take precedence over all other debts of the insolvent or to authorize us to make this a condition of allowing payment to the state to be made from his estate. There was no evident purpose thus broadly to upset state schemes of priority.

These examples are enough to show that the premises of the states' contentions are capable of supporting other conclusions than they draw from them. Other examples might be stated. But in each instance the inferences drawn by the states are counterbalanced with opposing ones quite or nearly as tenable. In some they are of greater weight.

It follows that Massachusetts and Illinois have not shown the clear inconsistency between the Act's explicit terms and our previous decisions, on the one hand, and achieving the Act's purposes, on the other, which is necessary to make out a case for reversal and thus for negating the force of Rev. Stat. § 3466 as creating federal priorities for Title 9 or other federal tax claims. The *Illinois* decisions were advisedly made, after full deliberation. There was no dissent on the basic question of priority, even though the issue seemed close. No substantially new argument or consideration of policy has been put forward. The case for reversal is no more clear or convincing than Illinois' position on the merits in the earlier litigation.

Nor are we persuaded that our former decisions were erroneous. For the strict policy of § 3466 had permitted

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case when operation is continued under judicial control than otherwise. And when that is the situation, insofar as the 1943 amendment applies the payment may be made and credit obtained. Insofar as it does not apply the amendment is a clear mandate against allowing that to be done.

few exceptions[20] and, as we repeated in *Illinois* v. *United States*, quoting *United States* v. *Emory*, 314 U. S. 423, 433, "only the plainest inconsistency would warrant our finding an implied exception to the operation of so clear a command as that of § 3466." 328 U. S. 8, 12. See also *United States* v. *Remund*, 330 U. S. 539, 544. There is no such inconsistency here.

Until the federal claims for taxes, whether under Title 8, Title 9 or other taxing provision are paid in full, the states are not entitled either to collect or to retain any part of the insolvent's debtor's assets. We do not anticipate that any of the state unemployment insurance programs will fail or be seriously impaired by reason of this decision, or their consequent failure to secure the small sums characteristically at stake in this extended litigation and, apparently, in other cases most likely to produce similar controversy. Nor would the Federal Treasury have been rendered bankrupt by a contrary result.

The judgment of the Circuit Court of Appeals is

Affirmed.

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[20] The original departures indeed did not contemplate that exceptions were being made. They conceived that the funds or property affected, being covered by mortgage, belonged in fact to third persons, not to the insolvent debtor. *Thelusson* v. *Smith*, 2 Wheat. 396, 426; *Conard* v. *Atlantic Ins. Co.*, 1 Pet. 386; *Brent* v. *Bank of Washington*, 10 Pet. 596, 611; see *Savings Society* v. *Multnomah County*, 169 U. S. 421, 428; cf. *United States* v. *Fisher*, 2 Cranch 358; *United States* v. *Hooe*, 3 Cranch 73. The Court has been loath to expand these exceptions, cf. *Illinois* v. *Campbell*, 329 U. S. 362, 370, to include other types of lien. The claims of Massachusetts and Illinois do not fall within the scope of those exceptions or of others as to which the Court has felt that subsequent legislation authorized them. Cf. *Cook County National Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478.

SUPREME COURT OF THE UNITED STATES

No. 157.—October Term, 1947.

Commonwealth of Massachusetts, et al., Petitioners, v. The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

[April 19, 1948.]

Mr. Justice Jackson, with whom Mr. Justice Frankfurter, Mr. Justice Douglas and Mr. Justice Burton join, dissenting.

This decision announces an unnecessarily ruthless interpretation of a statute that at its best is an arbitrary one. The statute by which the Federal Government gives its own claims against an insolvent priority over claims in favor of a state government must be applied by courts, not because federal claims are more meritorious or equitable, but only because that Government has more power. But the priority statute is an assertion of federal supremacy as against any contrary state policy. It is not a limitation on the Federal Government itself, not an assertion that the priority policy shall prevail over all other federal policies. Its generalities should not lightly be construed to frustrate a specific policy embodied in a later federal statute.

The Federal Government has sued to enforce a personal liability against one who, as assignee, paid to the State of Massachusetts funds which the Federal Government claims by virtue of its statutory priority. Defendant was the assignee of a small concern under a common-law assignment for benefit of creditors. The assets did not

realize enough to pay both federal and state tax claims. The United States filed a claim, among other things, for 100% of the taxes laid by Title 9 of the Social Security Act, which however, provides for a 90% credit against the federal tax if that amount has been paid into an approved state unemployment compensation fund. Believing that he was entitled thereby to pay the State and to claim the credit against the federal tax, this assignee paid $803.72 on the claim of Massachusetts for taxes under the Massachusetts Unemployment Compensation Act. This is the sum now demanded by the Federal Government.

The reasoning on which the assignee is held liable and the State is required to turn this amount over to the Federal Government is this: True § 902 gives a 90% credit. But, literally, it is only for actual payment to the State. On insolvency, the federal priority statute, so it is held, intervenes and freezes the funds in the assignee's hands so that he cannot pay the State until he has first paid the Federal Government. Hence, unless he has enough money to pay both claims in full, the priority statute prevents him from taking the credit which the Social Security Act grants him, the Federal Government collects a windfall ten times what would normally be its due, and the State government gets nothing on its tax claim. This Court now so construes the priority statute as not merely to prefer net claims of the Federal Government, but also as a prohibition against courts marshaling the assets of an insolvent in an equitable manner.

The District Judge declined to support this harsh reasoning. He is one whose views of the meaning of the Social Security Act are entitled to great weight, because of his experience with it. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548, at 553. He considered that as to 90% of the federal tax, the taxpayer in effect was given an option to pay it to the approved state fund or to the Federal Government. He said:

"The force of that analysis seemed to me the more persuasive when the true nature of Title IX of the Social Security Act as portrayed in *Charles C. Steward Machine Co.* v. *Davis*, 301 U. S. 548, was stressed. As to 90 per cent of the taxes under that title the objective of Congress was not to collect federal revenues but to stimulate the creation of and payment to state unemployment compensation funds. It would defeat obvious Congressional intent to lay down a rule which required that this 90 per cent should go to satisfy a Title IX tax claim instead of going to the direct benefit of claimants under state unemployment compensation plans."

The consequences of this Court's refusal to follow his reasoning are so inconsistent with the purposes of the Social Security Act that they could not have been intended by a reasonable Congress. What the Court is doing practically is this:

1. The Court is giving the Federal Treasury a payment from an insolvent taxpayer ten times as large as Congress exacted from a solvent taxpayer under like circumstances. The 90% was never contemplated as federal revenue, but credit for that amount was intended to be availed of, to induce states to create unemployment compensation funds and to maintain them in solvent condition.

2. The Court is depriving the State of a revenue Congress not only tried to assure it, but one which it used the tax and credit device to impel the state to collect. See *Steward Machine Co.* v. *Davis*, 301 U. S. 548.

3. This unjust enrichment of the Federal Government and the depletion of state unemployment funds is accomplished by holding that the priority statute prohibits simultaneous distribution to each, State and Federal Government, of the net amount actually due, taking into account such simultaneous payments, and by requiring instead that the total federal tax be paid in full and first in point of time, which in this case depletes the estate so

that the assignee cannot thereafter make the state payment to obtain the federal credit. It seems to me that the federal priority statute cannot have been intended to do more than secure to the Federal Government what becomes fairly due it on a marshaling of assets as courts of equity usually do.

4. This interpretation prejudices general creditors by placing ahead of them $190 of tax claims for every $100 actually owing. For example, the maximum tax for both the State and Federal Governments is that laid by the Federal Act—let us say it amounts to $1,000. It can be discharged by payment of $1,000, $900 paid to the approved state fund and $100 to the Federal Government. But under this ruling the insolvent must pay the $1,000 in full to the Federal Government. That, of course, leaves the state tax undischarged, which calls for payment of another $900 before anything can be left for the general creditors. Thus, where an equitable marshaling of assets to pay just claims would put $1,000 of taxes ahead of general creditors, the Court's ruling puts $1,900 ahead of general creditors. The Court even goes so far as to reject concessions by the Government designed to mitigate, in this respect at least, the harshness of this rule.

The interpretation of the Priority Act to thus gouge the states and private creditors is contrary to the purpose and spirit of the Act itself. Over a century ago Mr. Justice Story defined the "motives of public policy" which underlie the priority statutes of the Federal Government to be "in order to secure an adequate revenue to sustain the public burthens and discharge the public debts. . . ." *United States* v. *State Bank of North Carolina* (1832), 6 Pet. 29, 35. It is obvious that as to the 90% of the Social Security tax here involved, it was not contemplated as federal revenue to meet federal burdens but was laid to induce and to enable the State to assume specific obligations to the unemployed. The priority

statute is now invoked to deny, in this class of cases, the aid promised in meeting these obligations.

When a later statute has enacted a comprehensive federal policy in another field and created a federal interest in the adverse claimant's solvency or function, this Court has rarely, and never until recently, hesitated to interpret the old and general priority statute as yielding to the newer and specific statutory scheme. *Cook County National Bank* v. *United States*, 107 U. S. 445; *United States* v. *Guaranty Trust Co.*, 280 U. S. 478; *cf. Callahan* v. *United States*, 285 U. S. 515. See also dissent in *United States* v. *Emory*, 314 U. S. 423 at 433. The problem here is not whether a mere state claim can defeat one of the Federal Government, but whether one federal statute will be so construed as to defeat the manifest policy of another.

The Court's opinion, however, goes to some lengths to show that the Court as a whole and without dissent on this point has become committed to the interpretation it adopts, and by unusual deference to the doctrine of *stare decisis* declares itself bound hand and foot to full federal priority. I am unable to detect the commitment which the Court so clearly sees. But if I have agreed to any prior decision which forecloses what now seems to be a sensible construction of this Act, I must frankly admit that I was unaware of it. However, no rights have vested and no prejudicial action has been taken in reliance upon such a ruling. It does not appear to have been called to the attention of Congress and in effect approved by failure to act. Under these circumstances, except for any personal humiliation involved in admitting that I do not always understand the opinions of this Court, I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday.

I would reverse the judgment and allow federal priority only subject to the 90% credit for sums disbursed to the State on account of its unemployment compensation tax.